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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

GLEN LERNER and COREY  
ESCHWEILER,

Plaintiff(s),

v.

MICHAEL O'CONNOR,

Defendant(s).

2:14-CV-341 JCM (VCF)

**ORDER**

Presently before the court is a motion to dismiss filed by defendant Michael O'Connor. (Doc. # 6). Plaintiffs Glen Lerner and Corey Eschweiler have filed a response in opposition (doc. # 8) and defendant filed a reply (doc. # 12).

**I. Background**

Plaintiffs are attorneys with the firm Glen Lerner & Associates. (Doc. # 1 at p. 2).

Plaintiffs filed the instant action seeking declaratory relief relating to defendant having initiated arbitration against both plaintiffs in their individual capacities and against Glen Lerner & Associates. (Doc. # 1 at p. 8-9). Plaintiffs also allege abuse of process by defendant in initiating and "actively prosecut[ing]" the arbitration. (Doc. # 1 at p. 10).

Defendant initiated arbitration apparently stemming from a dispute regarding plaintiffs' representation of defendant in the acquisition of a sum of money left to him upon the death of his father. (Doc. # 1 at p. 3). Plaintiffs' firm and defendant had previously entered into a fee agreement

1 which includes an arbitration clause. (Doc. # 1 at p. 3). The clause states:

2           Arbitration of Disputes. It is agreed that any and all disputes,  
3           claims or controversies arising out of or relating to this  
4           agreement or to our performance of legal services hereunder,  
5           including but not limited to those relating to our fees and the  
6           quality or appropriateness of our services, shall be resolved at  
7           the request of any party hereto by final and binding arbitration  
8           before the Judicial Arbitration and Mediation Service.

9 (Doc. # 1 at p. 16). Plaintiff Corey Eschweiler signed the agreement under the heading “Glen  
10 J. Lerner & Associates.” (Doc. # 1 at p. 17).

11 Defendant now moves to dismiss the complaint based on the arbitration clause.

## 12 **II. Legal Standard**

13 A court may dismiss a plaintiff's complaint for “failure to state a claim upon which  
14 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a]  
15 short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R.  
16 Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does  
17 not require detailed factual allegations, it demands “more than labels and conclusions” or a  
18 “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
19 678 (2009) (citation omitted). “Factual allegations must be enough to rise above the  
20 speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a  
21 complaint must contain sufficient factual matter to “state a claim to relief that is plausible on  
22 its face.” *Iqbal*, 556 U.S. at 678 (citation omitted).

23 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
24 when considering motions to dismiss. First, the court must accept as true all well-pled factual  
25 allegations in the complaint; however, legal conclusions are not entitled to the assumption of  
26 truth. *Id.* Mere recitals of the elements of a cause of action, supported only by conclusory  
27 statements, do not suffice. *Id.* Second, the court must consider whether the factual allegations  
28 in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible  
when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference

1 that the defendant is liable for the alleged misconduct. *Id.* at 678.

2 Where the complaint does not permit the court to infer more than the mere possibility  
3 of misconduct, the complaint has “alleged – but not shown – that the pleader is entitled to  
4 relief.” *Id.* (internal quotations omitted). When the allegations in a complaint have not crossed  
5 the line from conceivable to plausible, plaintiff’s claim must be dismissed. *Twombly*, 550 U.S.  
6 at 570.

### 7 **III. Discussion**

8 The court will address plaintiffs’ second claim for abuse of process before addressing  
9 the first claim for declaratory relief.

#### 10 *A. Abuse of Process*

11 To state a claim for abuse of process under Nevada law, the complaint must allege:  
12 (1) an ulterior purpose for bringing a lawsuit other than to resolve a legal dispute; and (2) a  
13 willful act in the use of the legal process, not proper in the regular conduct of the proceeding.  
14 See *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002); *Posadas v. City of Reno*, 851 P.2d  
15 438, 444-45 (Nev. 1993) (internal citations omitted).

16 Plaintiffs’ second claim for abuse of process alleges that:

17 Defendant has instituted and continuously maintained and  
18 actively prosecuted an arbitration action against [p]laintiffs with  
19 JAMS. The actions of [d]efendant in the issuance of process  
20 and the maintenance and prosecution of the arbitration  
21 proceeding have been done for ulterior purposes which  
22 constitute a willful act in the use of process not proper in the  
23 regular conduct of the proceeding. As a direct and proximate  
24 result of [d]efendant’s abuse of process, [p]laintiffs have been  
25 damages[sic].

26 (Doc. # 1 at p. 10).

27 As plaintiffs note in their own response, “plaintiffs’ complaint is virtually identical to the  
28 language set forth in controlling Nevada Supreme Court case law concerning abuse of process claims.”  
(Doc. # 8 at p. 17). Plaintiffs’ complaint does not meet the pleading standard set out by Rule 8. *Iqbal*,  
556 U.S. at 678. The second claim provides only a “formulaic recitation of the elements of a cause of  
action” accompanied by nothing more than conclusory statements without any factual support. *Id.*

1 Therefore, plaintiffs' second claim for abuse of process will be dismissed pursuant to Fed. R.  
2 Civ. P. 12(b)(6).

3 *B. Declaratory Relief*

4 The Declaratory Judgment Act provides that "any court of the United States, upon the  
5 filing of an appropriate pleading, may declare the rights and other legal relations of any  
6 interested party seeking such declaration." 28 U.S.C. § 2201(a).

7 Plaintiffs' first claim for relief requests the court to grant declaratory relief on a laundry list of  
8 claims. (Doc. # 1 at p. 9-10). The only requested relief that appears to have merit is the first, which  
9 requests the court to declare "that [p]laintiffs have no duty to arbitrate claims of professional  
10 negligence against them by [d]efendant." (Doc. # 9). Plaintiffs argue that the claims against them in  
11 their individual capacities should be dismissed from arbitration, because the arbitration  
12 agreement—signed by defendant and plaintiff Corey Eschweiler as a representative of the firm Glen  
13 Lerner & Associates—was binding only upon the firm and defendant.

14 Section 2 of the Federal Arbitration Act ("FAA") provides that:

15 A written provision in . . . a contract evidencing a transaction  
16 involving commerce to settle by arbitration a controversy thereafter  
17 arising out of such contract or transaction . . . shall be valid,  
irrevocable, and enforceable, save upon such grounds as exist at law  
or in equity for the revocation of any contract.

18 9 U.S.C. § 2.

19 "In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and  
20 withdrew the power of the states to require a judicial forum for the resolution of claims which the  
21 contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10  
22 (1984). Courts shall place arbitration agreements "upon the same footing as other contracts." *Volt Info.*  
23 *Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

24 Additionally, § 3 of the FAA permits a court to stay an action while the parties proceed to  
25 arbitration. 9 U.S.C. § 3. "Despite the mandatory language, the Ninth Circuit has interpreted this  
26 provision to allow dismissal of the action in certain circumstances." *Germaine Music v. Universal*  
27 *Songs of Polygram*, 275 F. Supp. 2d 1288, 1299 (D. Nev. 2003).

1           The Supreme Court has directed courts to order arbitration when the court is “satisfied that  
2 neither the formation of the parties arbitration agreement nor [] its enforceability or applicability to the  
3 dispute is in issue.” *Granite Rock Co. v. Int’l Broth. of Teamsters*, 561 U.S. 287, 299 (2010). If a party  
4 is disputing either enforceability or applicability of the agreement to the dispute, the court is the one  
5 to resolve the disagreement. *Id.*

6           Plaintiffs here challenge whether the arbitration agreement was enforceable against them in  
7 their individual capacities. Therefore, it is the court’s responsibility to resolve. *Id.*

8           The court finds that plaintiffs Glen Lerner and Corey Eschweiler are subject to the arbitration  
9 agreement. The contract requires the parties to arbitrate “any and all disputes” including those relating  
10 to “the quality or appropriateness of *our* services.” (Doc. # 1 at p. 16) (emphasis added). Plaintiffs are  
11 agents of the firm Glen Lerner & Associates, and are thus bound by the arbitration agreement. *See*  
12 *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006). Nonsignatories have been bound to  
13 arbitration agreements where they “knowingly exploit[] the agreement containing the arbitration clause  
14 despite having never signed the agreement.” *Id.* (internal citations omitted). It would thwart the  
15 purposes of the Federal Arbitration Act if parties could renege on a promise to resolve claims through  
16 arbitration simply by claiming they were not signatories in their individual capacity.

17           Therefore, plaintiffs’ first claim for declaratory relief will be dismissed.

#### 18 **IV. Conclusion**

19           Plaintiffs’ second claim for abuse of process is insufficiently plead and is therefore dismissed.  
20 The court also finds that plaintiffs are subject to the arbitration agreement and therefore the claim for  
21 declaratory relief is dismissed.

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1           Accordingly,

2           IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion to  
3 dismiss (doc. # 8) be, and the same hereby is, GRANTED. The clerk is instructed to enter judgment  
4 accordingly and close the case.

5           DATED July 3, 2014.

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UNITED STATES DISTRICT JUDGE

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